IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

PAUL D. MCGINNIS, Commissioner of Correction of the State of New York, and VINCENT MANCUSI, Superintendent of Attica Correctional Facility,

Petitioners,

against

MARTIN SOSTRE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review a portion of the decision of the United States Court of Appeals for the Second Circuit in the case of *Martin Sostre* v. *Paul D. McGinnis, et al.* This case was heard by the Court sitting *en banc* and was decided on February 24, 1971.

Opinions Below

The opinion of the Court of Appeals is reported at 442 F. 2d 178. It is filed with this petition as Appendix

* Paul D. McGinnis is no longer the Commissioner of Correction. However, he is included here as a petitioner because there has been no formal substitution of parties, and because respondent may seek to recover personal damages from McGinnis.

"A". The opinion of the United States District Court for the Southern District of New York, dated May 14, 1970, which was reviewed by the Court of Appeals, is reported at 312 F. Supp. 863. This opinion and the order entered thereon are filed herewith as Appendix "B".

The opinion of the District Court, dated June 12, 1970, determining petitioners' motion for a stay pending appeal to the Court of Appeals is not reported. It is filed herewith as Appendix "C". The opinion of the District Court, dated September 4, 1969, granting a preliminary injunction on behalf of respondent, is reported at 309 F. Supp. 611. It is filed as Appendix "D" to the petition.

Jurisdiction

The judgment of the Court of Appeals was entered on February 24, 1971. The order of that Court denying rehearing *en banc* was entered on April 8, 1971. The order of that Court denying partial reconsideration of its decision was entered on April 21, 1971. The order granting respondent's motion to stay the mandate of the Court of Appeals, subject to the 30 day limitation of Federal Rules of Appellate Procedure 41(b), was entered on May 24, 1971.

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Question Presented

Whether the Court of Appeals properly held that an inmate who maintains an action under Section 1983 of the Civil Rights Act for alleged unconstitutional treatment in a state prison, need not employ state legal or equitable remedies designed to deal with such treatment, where the state remedy is adequate as a condition to seeking affirmative relief in the federal courts?

Statutes Involved

42 U.S.C. § 1983.

"Civil Action For Deprivation of Rights

Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

N. Y. Correction Law, § 24 (McKinney 1971)

"No civil action shall be brought in any court against the commissioner or a deputy commissioner of correction or an officer or employee of a state prison or reformatory or institution for criminally insane or mentally defective persons in the department, in his personal capacity, for alleged damages because of any act done or failure to perform any act, while discharging his official duties, without leave of a judge of a supreme court, first had and obtained. Any such officer or employee in any such action shall not be liable for damages if he shall have acted in good faith, with reasonable care and upon probable cause;

Any just claim for damages against such commissioner, officer or employee for which the state would be legally or equitably liable, shall be brought and maintained in the court of claims as a claim against the state."

N. Y. Civil Rights Law, § 79-c (McKinney's 1971).

"A convict sentenced to imprisonment is under the protection of the law, and any injury to his person, not

authorized by law, is punishable in the same manner as if he were not sentenced or convicted.

Nothing in sections seventy-nine or seventy-nine-a of this chapter shall be deemed to deny a convict sentenced to imprisonment the right to injunctive relief for improper treatment where such treatment constitutes a violation of his constitutional rights."

Statement of the Case

A. Factual Background

Respondent, Martin Sostre, is a New York State prisoner who is serving a sentence of 30 to 40 years as a second felony offender. This sentence was imposed on March 18, 1968, by the County Court of Erie County, New York, upon Sostre's conviction for possession of a narcotic drug and assault upon a police officer.

Immediately after respondent was sentenced, he was taken to Attica Correctional Facility, Attica, New York. He remained overnight at Attica and was transported on the following day to Green Haven Correctional Facility, Stormville, New York. Upon his arrival at Green Haven respondent was placed in the segregation unit for three days and then released to the general population.

On June 25, 1968, the late Warden Follette called respondent to his office and questioned him about two matters. The first was respondent's preparation of a motion for change of venue for his former co-defendant, who had not yet been brought to trial. The second was a number of references in respondent's letters to an organization known as "R.N.A.", and a statement in one of respondent's letters that he would be leaving the institution soon, either by having his conviction reversed by the courts or by being liberated by the "Universal Forces of Liberation."

As a result of the Warden's inquiries, which provoked an altercation, Follette ordered that Sostre be placed in the punitive segregation unit of the prison. This unit consisted of ordinary size cells that were contiguous to each other, and contained ordinary furnishings. However, inmates confined to this unit were subjected to certain restrictions and loss of privileges.

Segregation inmates were unable to mingle with the general population, unable to work or participate in any programs, unable to use the prison library and unable to attend movies. They were restricted to one shower and shave per week with hot water, and one hour of exercise per day outside of their cells, after submitting to a rectal search. They were not permitted to read newspapers or periodicals, but only a few books that were previously selected for the segregation library. They were not permitted to receive second portions of food or desserts, but their diets were otherwise normal. They were entitled, however, to all legal materials and writing implements.

After respondent had been sent to the segregation unit by Follette, he refused to secure his release by assuring Follette that he would abide by the rules of the institution, or by participating in a lay therapy program. Respondent was unable to earn good time credit during this period because he could not participate in any programs. Follette censored respondent's mail to and from his attorneys by excising anything which did not directly pertain to respondent's case.

In October, 1968, respondent commenced the instant lawsuit by filing a *pro se* complaint in the Southern District of New York. His first cause of action alleged primarily that he was denied rights under the Eighth and Fourteenth Amendments by having been placed in segregated confinement by Warden Follette. His second cause of action alleged that Warden Follette had interfered unlawfully with his mail, and that petitioner Mancusi and his agents had

refused to mail a legal document of his to a court, while he was at Attica. His third cause of action alleged that Governor Rockefeller, former Commissioner McGinnis, Warden Follette and Superintendent Mancusi, conspired to maintain a racially discriminatory prison system in the State of New York in violation of his rights under the Thirteenth and Fourteenth Amendments, and that allegedly he was punished for speaking out against this system. Pursuant to 42 U.S.C. § 1983, he sought injunctive relief and damages from the defendants in their official capacities.

On February 4, 1969, the Southern District Court (CROAKE, D.J.), denied a motion by the defendant state officials to dismiss the complaint. On July 2, 1969, the Southern District Court (MOTLEY, D.J.) issued an order restraining Warden Follette from holding respondent in segregated confinement. On July 31, 1969, the District Court (MOTLEY, D.J.) issued a preliminary injunction against Warden Follette on behalf of respondent, and advanced the case for trial. On September 4, 1969, the District Court rendered a memorandum opinion in support of its issuance of preliminary injunction (309 F. Supp. 611) (Appendix "D").

After he was released from segregated confinement, respondent was disciplined at Green Haven for possessing handwritten political literature which the prison authorities determined to be "racist." Shortly thereafter, in August, 1969, respondent was transferred to Wallkill Correctional Facility, a medium security institution, where he has remained until the present time.

A non-jury trial on respondent's complaint was commenced in the District Court (MOTLEY, D.J.) on October 29, 1969 and concluded on November 7, 1969. The District Court reserved decision pending the filing of briefs and conclusions of fact and law.

B. The Decision of the District Court

The District Court handed down a comprehensive opinion and order on May 14, 1970 (312 F. Supp. 863) (Appendix "B"). It held that respondent's rights under the First, Eighth and Fourteenth Amendments were violated, and it awarded respondent punitive and compensatory damages against both Warden Follette and Commissioner McGinnis. It ordered that the good time credit which respondent was unable to earn while in segregation, be restored to him.

The District Court found that respondent was improperly punished for expressing his political beliefs, and was subjected to cruel and unusual punishment by reason of the length of his segregated confinement and the conditions of such confinement. It imposed a limit on segregated confinement of fifteen days.

The District Court set down certain requirements for prison disciplinary proceedings involving respondent where loss of good time credit or segregated confinement was concerned, and it ordered the defendant officials to submit rules on disciplinary proceedings for its approval. The District Court enjoined the prison officials from censoring respondent's mail to courts, public agencies and attorneys, and it enjoined the prison officials from preventing respondent from rendering legal assistance to other inmates until the official provided a court-approved means of legal assistance. The District Court also enjoined the defendant from disciplining respondent for possessing political literature except in accordance with regulations approved by the Court.

The cause of action relating to Governor Rockefeller was dismissed, but the Court retained jurisdiction over the remainder of the action.

On June 12, 1970, the District Court entered a memorandum opinion and order staying certain portions of

its decision pending appeal (Appendix "C"). However, it declined to stay the portion of its injunction which required the defendants to give respondent notice of charges, confrontation of witnesses, right to counsel or counsel-substitute, and a written determination in disciplinary proceedings involving punitive segregation or loss of good time. This provision of the District Court's order was stayed by the Court of Appeals for the Second Circuit on July 10, 1970, except in cases where respondent was sentenced to segregation for more than three days at one time or more than a total of ten days pending the appeal.

C. The Decision of the Court of Appeals

The Court of Appeals heard argument in this case on October 21, 1970, sitting *en banc*. On February 24, 1971, it rendered an extensive decision, with two judges concurring, two judges concurring in part and dissenting in part, and two judges dissenting (Appendix "A").

At the outset, without elaboration, the majority held that exhaustion of state legal or equitable remedies was not necessary to maintain an action under 42 U.S.C. § 1983. The majority cited this Court's decisions in *McNeese* v. *Board of Education*, 373 U. S. 668 (1963), *King* v. *Smith*, 392 U. S. 309 (1968), and *Damico* v. *California*, 389 U. S. 416 (1967), and cited its own decision in *Wright* v. *McMann*, 387 F. 2d 519 (2d Cir. 1967).

The majority agreed with the finding of the District Court that Warden Follette improperly punished respondent by placing him in the segregation unit and then disciplining him for possessing political literature after his release from segregation. However, it disagreed with the District Court's conclusion that the length of respondent's confinement and the conditions of his confinement constituted cruel and unusual punishment, and it set aside the fifteen day time limit on segregation which had been established by the District Court.

The majority opinion rejected the procedural elements which the District Court required in prison disciplinary proceedings involving loss of good time credit or segregated confinement, and it vacated the requirement that the prison officials submit rules on disciplinary proceedings for the court's approval. It held instead that inquiries into misconduct would be minimally fair if the inmate was afforded notice of charges and the evidence against him, an opportunity to explain his behavior, and a reasonable investigation into the relevant facts.

With regard to possession of literature, the majority upheld the District Court to the extent that respondent could not be punished for possessing any literature except in accordance with reasonable regulations. However, the majority vacated the requirement that such regulations be submitted for the District Court's approval.

On the issue of mail censorship the majority affirmed the order of the District Court to the extent that respondent was permitted to correspond freely with courts, public officials and attorneys unless he abused the privilege. On the issue of legal assistance the majority affirmed the decision of the District Court in principle, but reversed the order of the District Court permitting respondent to render legal assistance to other inmates, on the ground that respondent had not sought permission from the Warden to give such assistance.

The majority affirmed the restoration of respondent's good time credit by the District Court, and affirmed in principle the award of compensatory damages (but not punitive damages) against Warden Follette. However, it noted that no party had been substituted for Follette and therefore no one was before the Court to pay the damage award.*

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* Follette died prior to the entry of judgment in the District Court, and no substitution of his estate was made by respondent

(*footnote continued on following page*)

The majority vacated the damages against Commissioner McGinnis and dismissed the action against petitioner Mancusi.

Former Chief Judge Lumbard concurred in the result but expressed the view that the majority should not have intimated what was required in disciplinary proceedings involving loss of good time credit. Judge Waterman concurred in the result but stated that the majority opinion should not be construed as a denial of federal judicial concern for the due process rights of state prisoners.

Judge Smith and Judge Feinberg concurred in most aspects of the majority opinion, but they each wrote dissenting opinions on the issues of cruel and unusual punishment and the liability of Commissioner McGinnis to respondent for damages.

Judge Hays and Judge Moore dissented on the ground that federal courts should refuse to interfere with the internal affairs of state prisons except in the most extreme cases which shock the conscience of the Court. Both judges believed that the trial court should have been reversed with respect to all relief granted.

Subsequent to the Court's decision, respondent moved for rehearing *en banc*. This motion was denied on April 8, 1971. The *amicus curiae* NAACP Legal Defense Fund, which had been permitted to participate in oral argument, also applied for rehearing and partial reconsideration of the Court's decision. This motion was denied on April.

(*footnote continued from previous page*)

Sostre at that time (or any time), pursuant to New York law. Accordingly, the action against Follette abated, and the District Court improperly awarded damages against him. The affirmance of the damage award by the Court of Appeals was also improper, but since the Court of Appeals acknowledged that there was no party to recover the damages from, petitioners have refrained from raising the issue at this time.

21, 1971. On May 24, 1971 the Court of Appeals issued an order staying its mandate pending application by respondent to this Court for a writ of certiorari, subject to the 30-day limitation of F.R.A.P. 41(b), 28 U.S.C.

Reasons for Allowance of Writ

The instant case presents a significant question which should be determined by this Court: Whether primary jurisdiction for cases involving claims of mistreatment in penal institutions should lie in the state courts or in the federal courts. Petitioners do not contend that the federal courts are without jurisdiction altogether, but rather that state prisoners should be required to resort to state legal and equitable remedies before invoking federal relief under Section 1983.

The decisions of this Court do not resolve the issue. In *Johnson* v. *Avery*, 393 U. S. 483 (1969), a habeas corpus case, this Court acknowledged the right of prison inmates to render legal assistance to each other where no alternative means of assistance was available. However, this Court noted in its opinion: "There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene." (393 U. S. at 486).

In *Zwickler* v. *Koota*, 389 U. S. 241 (1967), a case involving First Amendment rights, this Court stated that the judge-made doctrine of abstention could not preclude the exercise of federal jurisdiction except in narrowly limited "special circumstances." One such special circumstance was the susceptability of a state statute to a construction by the state courts that would avoid or modify the constitutional question. *Harrison* v. *NAACP*, 360 U. S. 167 (1959); *Reetz* v. *Bozanich*, 397 U. S. 82 (1970).

During the past year this Court held that non-intervention in state criminal processes was a principle of continuing validity, notwithstanding allegations of deprivations of First Amendment rights. *Younger* v. *Harris*, —— U. S. —— (Feb. 23, 1971, 39 U.S.L.W. 4201); *Samuels* v. *Mackell*, —— U. S. —— (Feb. 23, 1971, 39 U.S.L.W. 4211).

During 1970 this Court held that criminal convictions based upon a plea of guilty, where adequate assistance of counsel was afforded to the accused, could not be re-examined in federal habeas corpus proceedings where the petitioner claimed that the guilty plea was induced by an allegedly coerced confession. *McMann* v. *Richardson*, 397 U. S. 759 (1970).

Thus, there are two conflicting trends in this Court's decisions which require reconciliation in the context of prison treatment cases. The first is the desire of this Court to make federal forums available to suitors raising constitutional claims. The second is the reluctance of this Court to sanction federal intervention into state criminal and correctional processes. The experience of New York State provides one illustration of why this Court must determine the limits of these competing principles.

In 1967 the Court of Appeals for the Second Circuit reluctantly entertained jurisdiction in a prisoner civil rights action, without requiring exhaustion of state remedies, because the Court believed that the absence of injunctive relief under New York law rendered the state remedies inadequate. *Wright* v. *McMann*, 387 F. 2d 519 (1967). Subsequently, the New York Legislature in response to the invitation of the Court of Appeals amended its Civil Rights Law to remove any disabilities against a prisoner seeking to enjoin alleged unconstitutional treatment while incarcerated. (N. Y. Civil Rights Law, § 79-c, *supra*, p. 3).

Notwithstanding this legislative response to the *Wright* decision, and notwithstanding the Court's conclusion in

the instant case that respondent was not subjected to cruel and unusual punishment, the Court summarily held in the case at bar that respondent need not have exhausted legal or equitable remedies in the state courts before commencing the instant action.† By declining to recognize some form of non-intervention, albeit limited, in prison treatment cases, and by adjudicating all of respondent's claims on the merits, the Court failed to hold the line against the increasing intrusion of federal courts into matters that are primarily the concern of state government.

This intrusion has reached such alarming proportions that during the past year a distinguished member of the New York bench spoke out against the expansion of federal jurisdiction into the State's correctional processes. Presiding Justice J. Clarence Herlihy of the Appellate Division, Third Department, said in a speech to the Brooklyn Bar Association:

> "[The] haystack of federal jurisdiction seems to grow nonetheless. More recently, it has grown to include even the internal administration of our correctional system, a situation which has led by all accounts to a nearly complete disruption of an already troubled penal system, with effective rehabilitation and discipline virtually impossible . . .
>
> [A federal] decision 'with which we are now grappling held that certain acts of discipline which occurred several years ago at Clinton State Prison constituted cruel and unusual punishment.' As this is not a perfect world, I respect the court's findings of fact, although an expert criminologist testified that

† The statute providing for injunctive relief did not become effective until May, 1970, after respondent commenced the instant lawsuit, but the Court of Appeals did not base its ruling on this narrow ground.

° *Wright* v. *McMann*, 387 F. 2d 519, 521 (2d Cir. 1967).

severe discipline is frequently necessary in the unique subculture of a prison. In any event, the district court on remand did not limit itself to the isolated transactions involved, but extended its holding to the whole prison population, even to the extent of directing the Department of Correction to draft new disciplinary rules and regulations and submit them for the court's approval."** (New York State Bar Journal, June, 1971, 238-39).

Recently the Court of Appeals for the Eighth Circuit, in a decision which noted the enormous increase of prisoner lawsuits in the federal courts, held that prisoners who were challenging the conditions of their confinement under the federal habeas corpus statute were required to exhaust available state remedies. *Wilwording* v. *Swenson*, 439 F. 2d 1331 (1971). The Court's reasoning in that decision is relevant here:

> "In closing we think it appropriate to note the suggestion of the Attorney General of Missouri that the State of Missouri has statutory provisions relating to penal discipline, prison administration and conditions of judicially imposed confinements. When these laws are violated the Attorney General suggests that a prisoner may bring a suit for injunction, a writ of prohibition, or mandamus or a declaratory judgment in the state courts seeking relief. We have no way of knowing whether such petitions would be successful in reaching the merits, but that is no reason why cases of this type should not be presented to the Missouri courts in an appropriately recognized proceeding. And we assume that the Missouri courts will be diligent in protecting prisoners' rights where a proper case is presented." (433 F. 2d 1336-37).

** *Wright* v. *McMann*, 321 F. Supp. 127 (N.D.N.Y. 1970).

See Burns v. Swenson, 430 F. 2d 771 (8th Cir. 1970); *Cf. Brooks v. Wainwright*, 428 F. 2d 652 (5th Cir. 1970); *Haggerty v. Wainwright*, 427 F. 2d 1137 (5th Cir. 1970).

The practice of requiring state prisoners to initially pursue their remedies in the state courts rather than the federal courts is the better policy because the state has a compelling interest in seeing that its correctional system is running properly. In New York State, writs of habeas corpus and other matters are heard by the state judges at the maximum security prisons. These judges are better able to deal with problems of treatment than federal judges sitting many miles away. Furthermore, the state judges have responsibility for sentencing defendants to state facilities and therefore are vitally concerned about the conditions and programs at those institutions.

Since an inmate at a state institution is an unwilling guest, he often files numerous groundless complaints under § 1983. Not unexpectedly, § 1983 has become one of the most heavily litigated provisions of the United States Code. Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 Harv. L. Rev. 1486, 1487, n. 12 (1969). In 1970 the number of non-habeas corpus petitions filed by state prisoners in the federal courts increased by 41 per cent over 1969, and by 430 per cent over 1963. *Wilwording v. Swenson, supra*, 439 F. 2d 1331, 1333 n. 3 (8th Cir. 1971).

In *Rodriguez v. McGinnis*, —— F. 2d —— (2d Cir. March 16, 1971), Judge Hays expressed exasperation at having to deal with the burgeoning caseload of state prisoner complaints:

> "The issue in this case is typical of the increasing number of trivial questions of internal prison discipline now being brought, in the first instance, before the federal courts. If the results were not so serious for the administration of justice through state and

federal procedures, the spectacle of a federal court of appeals solemnly deciding on the penalty in terms of good time a state prisoner should receive for having dirty pictures in his cell (or for refusing to be a tattle tale) would be so absurd as to be laughable. But if this court entertains actions of this kind it will encourage state prisoners who have any kind of 'beef' to bring such actions and the federal courts will end up sitting as prison boards of discipline in the state prisons."

The range of subjects now litigated under § 1983 has reached the point where the Court of Appeals for the Fifth Circuit has been called upon to adjudicate a case involving haircuts and shaves (*Brooks* v. *Wainright*, *supra*, 428 F. 2d 652 [1970]), and the Court of Appeals for the Eighth Circuit has been forced to hear an appeal involving the alleged confiscation of an inmate's shoes: (*Howard* v. *Swenson*, 426 F. 2d 277 [1970]). As Justice Black aptly noted in his dissent in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, —— U. S. —— (June 21, 1971):

> "My fellow Justices on this Court and our brethren throughout the federal judiciary know only too well the time consuming task of conscientiously poring over hundreds of thousands of pages of factual allegations of misconduct by police, judicial, and corrections officials. Of course, there are instances of legitimate grievances, but legislators might well desire to devote judicial resources to other problems of a more serious nature.
>
> We sit at the top of a judicial system accused by some of nearing the point of collapse. Many criminal defendants do not receive speedy trials and neither society nor the accused are assured of justice when inordinate delays occur. Citizens must wait years to litigate their private civil suits. Substantial changes in correctional and parole systems demand the atten-

> tion of the lawmakers and the judiciary. If I were a legislator I might well find these and other needs so pressing as to make me believe that the resources of lawyers and judges should be devoted to them rather than to civil damage actions against officers who generally strive to perform within constitutional bounds. There is also a real danger that such suits might deter officials from the *proper* and honest performance of their duties." (39 U.S.L. Week at 4834).

The instant case, with its broad range of subjects involving the internal management of a state prison, presents an opportunity for this Court to define the right of state inmates to seek federal relief in the first instance, and to determine the limits of such relief where adequate remedies are available in the state courts.

CONCLUSION

A writ of certiorari should issue to review the decision below on the question of federal intervention into state correctional processes.

Dated: New York, New York, August 15, 1971.

Respectfully submitted,

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